

Sines, et al. v. Kessler, et al. - 6/25/2020

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE WESTERN DISTRICT OF VIRGINIA  
3                   CHARLOTTESVILLE DIVISION

4                   ELIZABETH SINES, et al.,

5                   Plaintiffs,

CIVIL ACTION 3:17-CV-00072

6                   vs.

7  
8                   JASON KESSLER, et al.,

9                   Defendants.  
10

11  
12                   TRANSCRIPT OF TELEPHONIC MOTION HEARING  
13                   HONORABLE MAGISTRATE JUDGE JOEL C. HOPPE PRESIDING  
14                   JUNE 25, 2020, 1:14 P.M.  
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19                   Court Reporter: JoRita B. Meyer, RPR, RMR, CRR

20                   210 Franklin Road, S.W., Room 540

21                   Roanoke, Virginia 24011

22                   (540)857-5100 Ext. 5133

23                   Proceedings recorded by electronic recording; transcript  
24                   produced by computer.  
25

A P P E A R A N C E S

On behalf of Plaintiffs Elizabeth Sines, Seth  
Wispelwey, Marissa Blair, Tyler Magill, April Muniz, Hannah  
Pearce, Marcus Martin, John Doe, Natalie Romero, and Chelsea  
Alvarado:

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Also Present:

**JONATHAN KENNETH ZWERLING, ESQUIRE**

1 (Proceedings commenced, 1:14 p.m.)

2 (Prior proceedings held, not recorded; hearing  
3 continued as follows:)

4 MS. LUNSFORD: ...would add that in one of the  
5 documents that I filed, there was an agreed motion and order  
6 for discovery entered by Judge Downer in the Charlottesville  
7 General District Court. I had wanted to file that, Judge,  
8 with the motion to reconsider, but I didn't have a copy of it  
9 as entered by the judge and had to obtain that from the  
10 court. It is under seal, as the Court can see, and so it was  
11 not available online; and I had some difficulty obtaining it,  
12 the signed copy of it.

13 It does provide on -- in paragraph number five, on  
14 the first page, that we agree not to allow additional  
15 materials provided by the Commonwealth to leave our  
16 possession or control.

17 And on the second page, where the judge has signed  
18 it, it indicates that the judge is ordering that the  
19 discovery in this case be handled in the manner described in  
20 the agreed motion and order regarding discovery.

21 So we're actually prohibited by this order -- which  
22 has never been amended, has never been withdrawn, has never  
23 been addressed by the Circuit Court -- prohibited from  
24 providing that material; so anything that came from the  
25 Commonwealth.

1           And we would request that the discovery that we  
2     received from the Commonwealth be treated the same as the  
3     federal material that we received from the U.S. Attorney's  
4     Office because of this order, and also suggest that another  
5     source of that material, which is more convenient, less  
6     burdensome, and less expensive, as set forth in Rule 26, is  
7     the Commonwealth Attorney himself. They have access to the  
8     material and they don't have to cull it for privileged  
9     information or work-product, as we would have to do, which  
10    would take an extensive amount of time.

11           Moving on, Your Honor -- I'm sorry. Go ahead.

12           THE COURT: Well, I think that argument that they  
13    should get it from the Commonwealth Attorney, I don't know  
14    that I've seen that argument before in either your motion  
15    that was filed back in February or even your motion to  
16    reconsider.

17           But what materials do you think are covered by this  
18    General District Court order?

19           MS. LUNSFORD: So what the order provides is, under  
20    state Rule 3A:11 and 7C:5, that were in existence at that  
21    time -- I think the rules change in July -- is that  
22    correct? -- but they haven't changed yet. Basically what we  
23    are entitled to under those rules is exculpatory evidence,  
24    basically *Brady* and *Giglio*, if any such evidence exists;  
25    statements of our clients. Statements of witnesses we're not

1 entitled to. We're not entitled to police reports. We're  
2 entitled to certificates of analysis. So there were some DNA  
3 certificates in this case; we are entitled to that.

4           The bulk of information that is provided by the  
5 Commonwealth around here, pursuant to open files, to include  
6 witness statements, police reports, videos of the scene,  
7 anything -- any photographs taken of the car, information  
8 that is not specifically exculpatory, or the statement of my  
9 client to law enforcement, not a statement made to someone  
10 else, but to law enforcement, anything else they're not  
11 required to provide to us, and so that would be protected  
12 under this order. Basically, it's anything that we couldn't  
13 get pursuant to Rule 3A:11 or 7C:5, we are not allowed to  
14 leave our possession.

15           The Commonwealth -- and the order -- or, I'm sorry,  
16 the open file agreement that the Court has previously seen,  
17 which the Commonwealth waived privilege on, is attached to  
18 this order. One of the documents I filed this afternoon was  
19 an e-mail exchange between Mr. Platania as Commonwealth  
20 Attorney and Mr. Zwerling, and he agreed that it does not  
21 nullify the court's -- (inaudible).

22           THE COURT: Ms. Lunsford, you're -- Ms. Lunsford, I  
23 can't hear you. You're breaking up.

24           MS. LUNSFORD: (Inaudible).

25           THE COURT: I still can't. I still can't hear you.

1           Can the deputy clerk hear? Is that my phone or is  
2   it --

3           THE CLERK: Your Honor, this is Karen, and she's  
4   staticy on my end as well.

5           THE COURT: Okay.

6           MS. LUNSFORD: Is this better? I picked up the  
7   handset.

8           THE COURT: No, it's still pretty -- still pretty  
9   staticy.

10          MS. LUNSFORD: I apologize, Judge. I don't hear any  
11   static on my end at this point.

12          THE COURT: Okay. I can hear you now.

13          MS. LUNSFORD: Okay. The e-mail exchange between  
14   Mr. Zwerling and Mr. Platania indicates that obviously the  
15   Commonwealth cannot agree away the Court's order that was  
16   entered in late October of 2017.

17          THE COURT: A number of questions. The order refers  
18   to "this case." What is your view of "this case"? I mean,  
19   this is a General District Court order. Does it just apply  
20   to the General District Court preliminary hearing and so  
21   forth in that case, or is it your contention that this order  
22   governs discovery in the Circuit Court as well?

23          MS. LUNSFORD: It's my contention that the term  
24   "this case" and, as a result, "this order," pertains to that  
25   case until it is concluded at some point in the future.

1           And to let the Court know, I am still counsel for  
2 Mr. Fields. I've done a notice of appeal, and our petition  
3 for appeal to the Court of Appeals of Virginia is not yet due  
4 but I expect will be due before the end of the summer.

5           And traditionally around here, in the City of  
6 Charlottesville and Albemarle County, orders of the General  
7 District Court follow through the Circuit Court unless and  
8 until amended or vacated by the Circuit Court; and that would  
9 include things like appointment of counsel.

10           There was never a new appointment of counsel in  
11 Circuit Court for either Mr. Hill or me. We never moved to  
12 withdraw. And so because of the General District Court's  
13 orders appointing us, we continued.

14           The same applies for experts that were appointed in  
15 the General District Court and who followed the case through  
16 the end. There were new orders for payment of one of those  
17 experts, but never a new order appointing the expert.

18           THE COURT: All right. And so any subsequent  
19 orders -- your view is any subsequent orders by the Circuit  
20 Court that might have addressed, might have addressed  
21 discovery -- were there any, or your contention is there  
22 weren't any?

23           MS. LUNSFORD: I have -- my recollection is there  
24 were not. My recollection is not the best at this point.  
25 And there were so many orders and going back and forth that I

1 did a search of my computer records, my pleadings file, and  
2 then also asked the clerk to see if they were aware of  
3 anything else, and couldn't find anything else. So I do not  
4 believe there's an additional order with regard to discovery.

5 And I will tell the Court -- I mean, the Court  
6 addressed the order pertaining to exhibits from Judge Moore  
7 in the Charlottesville Circuit Court, and I understand the  
8 Court's ruling and obviously accept that, but I will say that  
9 the judge never intended that the attorneys in this case  
10 release exhibits, either. And I think the spirit, if not, I  
11 would argue, the letter of that order, indicates that the  
12 exhibits were not to be released by anyone, but the --

13 THE COURT: Well, then the order is, but not that if  
14 you were given an exhibit from the Court that you could then  
15 release; it was -- I think it was clear, in my opinion, that  
16 if these were materials that you had and other -- that you  
17 had from a source other than receiving them from the Court as  
18 an exhibit, that they weren't covered by that, that order.

19 MS. LUNSFORD: I understand that that's the Court's  
20 reading of the order. And I don't mean any disrespect when I  
21 say that, having been in front of Judge Moore on motions and  
22 hearings with regard to this case for over a year and a half,  
23 almost two years, that he would not have hesitated to hold me  
24 in contempt had I released an exhibit that was presented at  
25 the trial even if I said, "But, Judge, I got it from another



1 source."

2           The Commonwealth is the one that released those  
3 exhibits, and the Court ordered that we provide them if we  
4 got them from another source. So obviously, you know,  
5 there's a bit of a conflict, but I'll take that up with Judge  
6 Moore.

7           But anyway, having said that --

8           THE COURT: Ms. Lunsford, so if this was -- if this  
9 order from the General District Court that was entered three  
10 years ago, this was always governing your conduct in handling  
11 discovery in this case, and you filed a motion to quash in  
12 February, over four months ago, why is this just being filed?  
13 I mean, it was filed 21 minutes before this hearing.

14           MS. LUNSFORD: I appreciate the Court's question,  
15 and I apologize. The only explanation -- and it's not an  
16 excuse -- that I can offer is, as I indicated, I thought  
17 there was an order, I had looked through my file, I expected  
18 that if there was an order pertaining to discovery, it would  
19 be in my pleadings file. It was not in my pleadings file. I  
20 found it when I was -- or I didn't find it, the endorsed  
21 order. I found a draft of the order in an e-mail from Nina  
22 Anthony, who is an Assistant Commonwealth Attorney for the  
23 City of Charlottesville and worked on this case. I found it  
24 in an e-mail attachment while I was preparing the motion to  
25 reconsider, and then started trying to find out if it had, in

1 fact, been entered.

2 Mr. Hill and I, and, frankly, the Commonwealth,  
3 treated all the documents, unless we entered them as exhibits  
4 at trial or submitted them in our case to experts or had the  
5 experts review them, treated them consistent with the terms  
6 of this order.

7 We had law students who acted as interns on this  
8 case, who the Court required to sign confidentiality  
9 agreements with regard not only to the documents but anything  
10 they touched with respect to this case.

11 So, you know, we were highly sensitive during the  
12 course of the trial, and even until today, about what we  
13 released in this case.

14 I did not have a copy of the order, and that's the  
15 only explanation that I can give to this Court with respect  
16 to why I didn't attach it originally.

17 By the same token, you know, thinking about  
18 Mr. Platania, he had obviously forgotten about it, too, or I  
19 don't think that he would have waived the provisions of the  
20 open file agreement, which is attached to this order.

21 THE COURT: Did you receive -- every bit of  
22 discovery received from the Commonwealth in your  
23 representation of Mr. Fields, did you receive it while the  
24 case was in General District Court, or did you receive some  
25 after it moved to Circuit Court? And do you think that makes

1 a difference? I mean, do you think that, regardless of the  
2 timing of the disclosure, that it's all covered by the  
3 General District Court order?

4 MS. LUNSFORD: To answer your second question, yes,  
5 I think, regardless of the timing, it's covered by the order.  
6 And this may be, you know, a matter of practice around here  
7 and a matter of understanding, but our view, as I said, even  
8 with respect to appointments and other orders, is that they  
9 followed to Circuit Court unless they were amended or  
10 modified in some way.

11 To answer your first question about did we receive  
12 everything from the Commonwealth prior to the time that it  
13 left General District Court, we did not. We received  
14 information from the Commonwealth, pursuant to their open  
15 file and discovery policies, you know, I would guess as late  
16 as -- trial was in November 2018. You know, I -- I don't  
17 know exactly when we received stuff, but I wouldn't be  
18 surprised to go back and discover that we received stuff in  
19 November of 2018. It was constant.

20 THE COURT: All right. I want to wrap up the issue  
21 of the General District Court's order here, everything you  
22 have to say on that, and if Mr. Hill has anything else to  
23 add, and then I'd like to hear from plaintiffs on that issue  
24 before we move on to anything else.

25 MS. LUNSFORD: Other than that it is more

1 convenient, less burdensome, and less expensive for the  
2 plaintiffs to receive it from the Commonwealth. And they  
3 were -- they did discuss it with the Commonwealth. I'm not  
4 sure why the Commonwealth elected not to provide it and,  
5 rather, directed that it be received from us. The  
6 Commonwealth, as I said, does not have the issue of privilege  
7 with respect to Mr. Fields that would require us to go  
8 through and create the privilege log. They can produce  
9 everything as they see fit. But, frankly, I think they are  
10 still bound by the terms of this order as well.

11 THE COURT: All right.

12 MS. LUNSFORD: Actually, they are not. I'm sorry.  
13 Paragraph five talks about counsel for the defendant.

14 MR. ZWERLING: Judge, this is John Zwerling. Could  
15 I add one thing to this?

16 THE COURT: Well, Mr. Zwerling, you haven't -- are  
17 you -- have you made an appearance in the case?

18 MR. ZWERLING: Well, Ms. Lunsford is not a party.

19 THE COURT: Well, she's a movant.

20 MR. ZWERLING: Let me speak to her and see if she  
21 wants to say it. Okay?

22 THE COURT: Okay. I can hear somebody else's  
23 conversation in the background. So if everybody else can put  
24 their phones on mute, perhaps.

25 MS. LUNSFORD: Your Honor, I would just say, in

1 addition to what I've already argued, the Commonwealth must  
2 have contemplated that we continued to be bound by this  
3 agreement, because they did continue to provide us discovery  
4 throughout the course of this, this case, up through and  
5 including at least through trial, if not through sentencing.  
6 And it was actually -- as I said, I received this order, the  
7 draft of the order, from the Commonwealth. It was -- it was  
8 not a document that I created. It was something that they  
9 had created and used in other cases and they were adamant  
10 that we abide by. And as the Court can see in number five,  
11 it applies to the defendant, counsel for the defendant. It  
12 doesn't apply to the Commonwealth.

13 THE COURT: All right. Mr. Hill, is there anything  
14 that you wanted to add to that argument?

15 MR. HILL: No, Judge.

16 I will, however, say one thing about our -- I guess  
17 our memory of that order and its existence, in that about two  
18 weeks ago I supplied two documents to Mr. Siegel in response  
19 to the subpoena that clearly, now that we look at it, were in  
20 violation of that order. And so, you know, when we  
21 discussed -- when Denise and I discussed, you know, what we  
22 could send to Mr. Siegel in an attempt to comply with the  
23 Court order, we talked about items we received directly from  
24 the Commonwealth, and only from the Commonwealth. We sent  
25 two items that belonged in that category. But now, in

1 retrospect, in looking at this order, it seems that those  
2 items that we provided were probably protected by the General  
3 District Court order.

4 So I'm sorry that I didn't remember it. I know that  
5 Denise is accurate in that there were a lot of orders entered  
6 in this case, and I apologize that we didn't find it sooner.

7 THE COURT: All right. All right.

8 Well, Mr. Siegel or Mr. Bloch, I know that  
9 neither -- the time to respond to the motion to reconsider or  
10 the motion to stay hasn't been passed, and y'all may not have  
11 even had a chance to read what was just filed shortly before  
12 the hearing, so I certainly want to make sure that y'all have  
13 time to address these issues. And not just here today, but  
14 if you need time to research them and consider them more  
15 fully or to confer with the movants or the Commonwealth, you  
16 know, I'm not trying to short-circuit that. I do think that  
17 it was important to try and -- try and do this hearing on the  
18 motion to reconsider, as it was written, and to address the  
19 issues raised in the motion, to do that quickly so this case  
20 could continue to move, move forward, on this issue.

21 But what do either one of y'all have to say about  
22 the arguments presented today?

23 MR. SIEGEL: Your Honor, this is Joshua Siegel. And  
24 thank you. I do have some thoughts and I think some things  
25 that are important to keep in mind.

1 I think it's important to view the requested relief  
2 and the scope of the legal standard that applies to the  
3 motion. So we're here on a motion to reconsider. And the  
4 law is very clear that those motions are strongly disfavored.  
5 They are to not be used as a vehicle to relitigate issues,  
6 give parties a chance to craft new or better arguments, to  
7 present facts that were previously available or already  
8 existed, or allow them a second bite at the apple. The law  
9 is very clear in this court and the Fourth Circuit on that.

10 And as it relates to the timing, the timeline of  
11 events that got us here today is, Ms. Hill -- I'm sorry,  
12 Mr. Hill and Ms. Lunsford have a client that is a party in  
13 this case and in, I think, three years of litigation, have  
14 produced zero documents to us. We've issued a subpoena to  
15 Mr. Hill and Ms. Lunsford in January. They filed their  
16 motion to quash in February. We then briefed it and we filed  
17 our opposition in March. They chose not to file a reply. We  
18 filed a supplemental brief in May, advising the Court of  
19 precisely this issue: that the Commonwealth Attorney had  
20 agreed to waive the open file agreement. Mr. Hill and  
21 Ms. Lunsford chose not to respond.

22 On June 12, the Court issued the order, in large  
23 part denying the motions to quash.

24 On June 18, they filed a motion to reconsider.

25 This order is two and a half years old. Just

1 looking at it -- like you said, Your Honor, it was filed a  
2 few minutes before the hearing. I'm looking at it while  
3 we're talking. This order was not raised in the motion to  
4 quash. It wasn't raised in the motion to reconsider. I  
5 spoke with Mr. Hill on the phone a week ago about the  
6 document production. He didn't raise this order. I spoke  
7 with Mr. Hill on the phone just this week about this  
8 teleconference; he didn't raise it. Mr. Hill sent me a  
9 letter yesterday about his document production and didn't  
10 raise it.

11 Now they file it 20 minutes before the hearing.  
12 There's no reason this couldn't have been raised in January  
13 or in February, when Mr. Hill and Ms. Lunsford filed their  
14 motions to quash.

15 And I think Ms. Lunsford said that she thought it  
16 existed, she just couldn't find it. To me, that does not  
17 meet the standard of the disfavored and  
18 only-granted-sparingly remedy of a motion to reconsider.

19 As it relates to the order -- again, I'm just  
20 looking at it right now, Your Honor, so apologies if this is  
21 going to be incomplete, but I think a couple things to note.  
22 I think the Court was exactly right when you said this is a  
23 General District Court order. I think it's a fundamental  
24 principle that one cannot control the treatment of evidence  
25 in a different court. Again, that issue is being raised for



1 the first time right now, so we haven't had a chance to  
2 address that.

3 Even if the order did apply, it appears -- again  
4 just reading what it says in paragraph five, it simply  
5 memorializes the open file agreement that the Commonwealth  
6 Attorney has already waived; and he waived that months ago.

7 On top of that, on its face, it doesn't apply to  
8 documents that are in the scope of Rule 3A:11(b) or Rule  
9 7C:5. And I think Ms. Lunsford spoke a bit about that.

10 And we addressed this also in our opposition to the  
11 motion to quash, laying out the categories of documents. For  
12 example, written statements from Mr. Fields, any confessions  
13 he made, written reports of autopsies, expert reports,  
14 fingerprint analyses, all those things are acknowledged in  
15 the scope of this order. So there is a large volume of  
16 material that, even if this order did apply, are encumbered  
17 by it.

18 And on top of that, they said a few minutes ago that  
19 those rules don't apply to the police reports. They've  
20 already provided us with police reports.

21 So, Your Honor, I don't think that this order should  
22 be used as an eleventh hour -- frankly, we're well past the  
23 eleventh hour now. It shouldn't be used in regards to these  
24 documents, that we could have dealt with this order in  
25 January, but we are three weeks from the deposition deadline.

1 We're a few weeks away from the end of third-party discovery  
2 after years of discovery. And I know Your Honor is very  
3 familiar with the difficulties we've had getting discovery  
4 from virtually any of the defendants and now, you know,  
5 virtually any of these third parties.

6 And so our view is that the Court should not  
7 consider this, the newly filed order. However, I will say  
8 that if the Court is inclined, it seems to me that there's a  
9 simple solution if the Court does decide that this order  
10 applies in that this order appears to be an agreed order  
11 between Ms. Hill -- I'm sorry, Ms. Lunsford and the  
12 Commonwealth's Attorney's Office.

13 The Commonwealth's Attorney's Office has already  
14 agreed to waive the open file agreement. Ms. Lunsford is  
15 already under an order from this Court to produce those  
16 documents. They asked for a very short extension of ten days  
17 in the motion to stay. And if Your Honor wants to give any  
18 weight to this order at all, I think, at most, it would be  
19 they have a ten-day extension and in that time it is  
20 incumbent on Ms. Lunsford to submit an agreed order modifying  
21 this order, an agreed order, because the Commonwealth  
22 Attorney has already agreed to it. She already has a court  
23 order. She hasn't produced these documents. And, frankly,  
24 at this point, Your Honor, I think the burden is on them. We  
25 believe we could have dealt this issue six or seven months

1 ago, and it is being raised for the very first time minutes  
2 before this hearing.

3 THE COURT: It's interesting. As Ms. Lunsford  
4 acknowledges, this order is really for the -- it's drafted by  
5 the Commonwealth. It's -- sounds like it's for the  
6 Commonwealth's benefit. It's not -- you know, something that  
7 Ms. Lunsford notes Mr. Fields agreed to, but it wasn't  
8 necessarily what he would have done from his choosing. It's  
9 really at the Commonwealth's instigation, and now the  
10 Commonwealth hasn't waived those protections, but it's not  
11 just an agreement between the parties. It's essentially a  
12 protective order of another court regarding those documents.

13 MS. LUNSFORD: Could I speak to that briefly, Your  
14 Honor?

15 THE COURT: Sure.

16 MS. LUNSFORD: I mean, the order on its face talks  
17 about the agreement extending to Mr. Fields, who we could not  
18 provide copies of materials that we got from the Commonwealth  
19 even to our client, and it was not -- in paragraph seven, we  
20 had to agree that it would not be made part of his file, so  
21 that if we were relieved as counsel in some manner, we could  
22 not transmit it to new counsel. And while that's incredibly  
23 unusual, it was something that the Commonwealth asked for in  
24 order to provide us with discovery, and so we were willing to  
25 enter into it to get the discovery, number one; but secondly,

1 Charlottesville is where this trial was going to take place,  
2 ultimately did take place. It's a very small community.  
3 Defense was concerned that information from the file, the  
4 Commonwealth's open file, if that got out in any way prior to  
5 trial and we did not get a change of venue, which we did not,  
6 we would be extremely hampered, even more than we already  
7 were, in picking a jury.

8 So while it was provided to us by the Commonwealth,  
9 and ordered us to make disclosure, it was something that we  
10 wanted both to get the additional discovery and also to sort  
11 of use as a shield in the event other people, our client,  
12 experts, people that we didn't feel needed access to  
13 information, and this notwithstanding, but that we -- so that  
14 we could get the information in a manner that made the  
15 Commonwealth comfortable, but also that we would not be  
16 required to produce any information, we could require  
17 confidentiality agreements from people that don't ordinarily  
18 sign such things, and have access to all that information.  
19 Otherwise --

20 MR. SIEGEL: Your Honor --

21 MS. LUNSFORD: Go ahead. Sorry, Josh.

22 MR. SIEGEL: Your Honor, this is Mr. Siegel, if I  
23 could respond to that.

24 THE COURT: Sure.

25 MR. SIEGEL: So, again, Your Honor, we're just

1 rehashing old ground here. These are more, frankly,  
2 roadblocks that is not entitling us to discovery here,  
3 because what I just heard is it was important that the  
4 Commonwealth's Attorney -- it is important to the  
5 Commonwealth's Attorney that Ms. Lunsford and Mr. Hill don't  
6 give this to Mr. Fields.

7 We're not asking that it be given to Mr. Fields.  
8 That's a nonissue here.

9 I also heard Ms. Lunsford say that, well, the  
10 Commonwealth's Attorney wanted to be very careful about what  
11 happened to this, what happened to this evidence.

12 The Commonwealth's Attorney has already agreed they  
13 can disclose it. These are not reasons not to produce it.  
14 These are artificial reasons to keep it away and got give us  
15 these documents that we've been trying to get for years from  
16 both their client, and then we've been litigating this for  
17 six, almost seven, months on this one issue and we still  
18 don't have documents.

19 Even the documents we do have -- I think they  
20 produced two documents to us out of the categories that they  
21 admit in their briefs are on their face not privileged. They  
22 say they have a whole bunch of e-mails from third parties,  
23 that were unsolicited e-mails from third parties about  
24 Fields, about the car attack, about the rally. We don't have  
25 any of those. They say they got records about Mr. Fields

1 from the military service. We don't have those. The stuff  
2 that they say they will give us, they're not giving us, and  
3 the stuff that they don't want to give us, they're inventing  
4 these new arguments that have already been litigated. The  
5 Commonwealth Attorney has already agreed none of the  
6 arguments make any difference and nothing changes the order,  
7 even if it was raised in the first instance on the motion to  
8 quash, which it wasn't.

9 MR. HILL: Can I ask a question of Mr. Siegel,  
10 Judge?

11 THE COURT: Who is that?

12 MR. HILL: Why haven't you received these documents  
13 from the Commonwealth Attorney?

14 THE COURT: Who's speaking? Is this Mr. Hill?

15 MR. HILL: Yeah.

16 THE COURT: Yeah, for the -- because this is being  
17 recorded, I do need you to --

18 MR. HILL: I'm sorry. Yes.

19 THE COURT: I do need you to identify yourself.

20 MR. HILL: This is Mr. Hill. I'm just curious --

21 THE COURT: Mr. Hill, hold on. I think that's a  
22 good question, but rather than you posing it, how about if I  
23 ask it?

24 Mr. Siegel, are there other ways that the plaintiff  
25 has explored to try and obtain this information so that it

1 would be less burdensome on Ms. Lunsford and Mr. Hill?

2 MR. SIEGEL: I'm happy to address that, Your Honor.

3 First, on the issue of burden, again, burden has  
4 never been raised until the motion to reconsider. They  
5 certainly could have argued burden in a motion to quash, and  
6 they didn't.

7 As far as quantifying the burden, they never tell  
8 you anywhere in their papers any sort of definition about  
9 why -- what sort of burden this imposes. They say they have  
10 a hard drive and three thumb drives that contain discovery  
11 from the Commonwealth. There's no burden to produce that  
12 because it doesn't have to be reviewed. It's responsive and  
13 cannot be privileged because they received it from the  
14 Commonwealth. That is no burden.

15 They say they have two other thumb drives they're  
16 trying to figure out where they received it. They say they  
17 have third-party -- unsolicited e-mails from third parties.  
18 Those are not privileged. And they said that they relate to  
19 the rally and the car attack; so they're responsive.

20 So they have yet to articulate any specific burdens  
21 here, to begin with, other than just saying: it's burdensome.  
22 That's not any -- that's not a description of burden that  
23 contains any specificity and does not meet the standard to  
24 raise an objection.

25 As to --

1 THE COURT: You're not seeking any -- and you're  
2 clear in the subpoena you're not seeking anything that's  
3 work-product, you're not seeking anything that is  
4 attorney-client communications. Really anything that  
5 Ms. Lunsford or Mr. Hill would have created in their defense,  
6 you're not seeking that?

7 MR. SIEGEL: That's correct, Your Honor. We've said  
8 that multiple times. And despite us saying that, they keep  
9 responding -- they keep kind of ignoring the fact that we're  
10 limiting it and still saying it's burdensome.

11 A great example is in the motion to reconsider, I  
12 think they have a whole page about jury information. We said  
13 in our opposition to the motion to quash we're not seeking  
14 information about jurors.

15 You wrote in your opinion, we're not seeking  
16 information about jurors. There again, throwing it out there  
17 as another reason not to produce these documents.

18 But you're exactly right. We're not seeking  
19 attorney-client privileged information. We're not seeking  
20 work-product information. Most of the stuff -- when they  
21 describe it in their brief, most of the stuff is, by  
22 definition, not privileged and not work-product and doesn't  
23 even need to be reviewed.

24 And on that note, I know there are multiple  
25 decisions from this Court -- and I can cite some of them if



1 you'd like, Your Honor -- that talk about the situation where  
2 a party says -- makes the argument that it can be very  
3 burdensome to review all these documents and identify which  
4 ones are privileged and which ones are not. And this Court  
5 has repeatedly said, that's not really a valid excuse because  
6 most of the time, and certainly in this case, there's a  
7 protective order with a claw back.

8           So when you're producing a giant tranche, for  
9 example, of third-party e-mails, that are these unsolicited  
10 third-party e-mails, or a hard drive that you got from the  
11 Commonwealth, and if for some reason there happens to be a  
12 privileged document in there, we're not allowed to use it,  
13 we're not allowed to read it, we have to destroy it, we can't  
14 give it to anybody. These are standard provisions. This is  
15 the same standard the plaintiffs and defendants are under,  
16 the same protective order that exists in this case.

17           So, again, there's no -- there's no burden here and  
18 they have not articulated a burden. I think the most  
19 specific they got was that there are four boxes of documents,  
20 other than the electronic documents, which again I said can  
21 largely be produced without review.

22           On the issue of getting these documents from another  
23 source other than the Commonwealth's Attorney, we've gotten  
24 some documents from them, but there's two kind of fundamental  
25 issues that don't allow us -- won't allow us to get the

1 documents we're seeking from Mr. Hill and Ms. Lunsford. One  
2 is some of the documents Ms. Lunsford and Mr. Hill have, the  
3 Commonwealth's Attorney does not have.

4 For example, they told you in the motion to  
5 reconsider they have all these e-mails from third parties  
6 about the attack, about Fields. The Commonwealth Attorney  
7 doesn't have those.

8 I think it's not unreasonable to assume that some  
9 documents they got independently of the Commonwealth's  
10 Attorney. For example, they talk about their client's armed  
11 services records. I don't know if they got those from the  
12 Commonwealth's Attorney or not, but if they got it as part of  
13 their investigation, which I'm sure they undertook some  
14 investigation in the representation of their client on a  
15 murder case, to the extent they didn't create them and those  
16 are pre-existing records, or whatever materials they  
17 obtained, those are not privileged, those are not  
18 work-product. They can be produced. The Commonwealth's  
19 Attorney doesn't have them.

20 They also have things -- they called during their  
21 case a crash reconstruction expert. They have his report.  
22 They didn't get that -- I don't believe they got that from  
23 the Commonwealth's Attorney.

24 Other evidence they may have collected -- his social  
25 media accounts, as Your Honor knows, that's a very big deal

1 in this case. Mr. Fields has refused to produce any. Again,  
2 not privileged, no need to review.

3 As far as documents that they received from the  
4 Commonwealth's Attorney, as Ms. Lunsford explained to you, it  
5 was kind of -- and as I understand it from the Commonwealth's  
6 Attorney, the way Ms. Lunsford and Mr. Hill obtained  
7 documents was on a rolling basis, and they were allowed to go  
8 in and inspect the file and copy specific documents. So the  
9 Commonwealth's Attorney doesn't have a record of -- I don't  
10 think they can tell exactly what was given to Ms. Lunsford  
11 and Mr. Hill. And as a result of that, they would have --  
12 the Commonwealth's Attorney can't just say, Oh, here's a hard  
13 drive that we exchanged with the other side, so we know it's  
14 not privileged, it doesn't have to be reviewed, because they  
15 don't know what Ms. Lunsford and Mr. Hill have.

16 Ms. Lunsford and Mr. Hill can do that. They do have  
17 a hard drive and three thumb drives that they got from the  
18 Commonwealth's Attorney. It doesn't have to be reviewed.  
19 The Commonwealth Attorney would have to do that. It's not as  
20 easy for the Commonwealth's Attorney to produce as it would  
21 be for Mr. Hill and Ms. Lunsford, because the Commonwealth's  
22 Attorney does generate work-product.

23 THE COURT: And really all that is is just seeking  
24 discovery from another third party. I don't know, the  
25 federal rules would say -- well, it's one thing to say you

1 have to -- you have to try and obtain this information from  
2 the party rather -- rather than a third party, but I don't  
3 know of any decision saying, rather than trying to obtain  
4 documents from one third party, where that could be  
5 burdensome, you really have to go and try and get them from  
6 another third party.

7 MR. SIEGEL: And that was actually my next point,  
8 Your Honor, because what happens --

9 MS. LUNSFORD: Your Honor, I --

10 MR. SIEGEL: -- is when you go to one third party,  
11 they point the finger at another third party. Then you go to  
12 that third party, then we're having another hearing and that  
13 third party is pointing to another third party.

14 And it's not my obligation to obtain evidence from  
15 who Ms. Lunsford and Mr. Hill think I should obtain it from.  
16 We issued them valid subpoenas. Those subpoenas are the  
17 subject of multiple briefs at this point. They filed their  
18 motion to quash. They had their bite at the apple. The  
19 Court ruled on it.

20 This is not an extraordinary request, Your Honor.  
21 This is basic discovery. We're not asking the Court to waive  
22 privilege. We're not asking the Court to give us  
23 work-product because we have substantial need. We're asking  
24 for basic documents that they obtained from third parties or  
25 that are -- that relate to their client, that are critical

1 evidence in this case, critical evidence in the criminal case  
2 that they've already had. This is not an extraordinary  
3 request. This is basic document discovery. Because for  
4 three years we've been denied that from Mr. Fields.

5 MS. LUNSFORD: Your Honor, if I can speak to this, I  
6 think Mr. Siegel -- I understand Mr. Siegel's points, and I  
7 understand the Court's familiarity with the civil litigation,  
8 which neither Mr. Hill nor I are. Mr. Hill and I are not  
9 civil attorneys. We don't practice civil cases in federal  
10 court. We're not parties to the proceeding. Mr. Fields has  
11 an attorney who represents him in this.

12 These -- the subpoenas came in late January, so not  
13 knowing civil procedure, not having -- we were appointed in  
14 the underlying case. I am a sole practitioner. I have no  
15 support staff currently; it's just me in the office.  
16 Mr. Hill has two attorneys in his practice, one of which I  
17 think is part-time, and a very small support staff. We do  
18 not have substantial funds and are trying to -- in addition  
19 to responding to this discovery and protect our client's  
20 interests, the person who is still our client, we're also  
21 trying to make a living. So I just want to put that out  
22 there, because I think it's important when the Court is  
23 considering undue burden.

24 We were not aware and were not noticed, as we put in  
25 the motion to reconsider, that there would be any

1 consideration of our motion to quash in the hearing heard in  
2 April, a time at which our courts were closed and our offices  
3 were severely --

4 THE COURT: Ms. Lunsford, let me cut you off there.  
5 That hearing, it was just a status conference, and what  
6 happened at that hearing -- you may know this, you may not --  
7 was that I just asked if any of the motions had been  
8 resolved. Some of them had; some of them hadn't. And then I  
9 asked if anybody wanted a hearing. There wasn't any  
10 substantive discussion of the motions.

11 And, you know, the Court's local rules, the  
12 scheduling order, it puts the burden on the parties -- or a  
13 movant in your case -- to request a hearing. It's not the  
14 Court's job to track down anyone who files something in the  
15 case to find out if they want a hearing. I took that extra  
16 step because I was trying to give everybody the maximum  
17 opportunity to weigh in on these motions.

18 MS. LUNSFORD: Yes, sir.

19 THE COURT: There was an opposition filed to your  
20 motion, and under the rules you have an opportunity to reply.  
21 Y'all didn't reply. You know --

22 MS. LUNSFORD: I agree and I apologize.

23 THE COURT: -- we really expect everybody, even pro  
24 se litigants, to familiarize himself or herself with the  
25 rules of the court and the federal civil or criminal

1 procedural rules. So, you know, I just -- I don't think that  
2 any of those arguments provide any reason for me to  
3 reconsider.

4 Now, I --

5 MS. LUNSFORD: Well --

6 THE COURT: But at the same time, but the one thing  
7 that you did say -- and let me just amend what I just said a  
8 little bit. One thing that you did say that I do think  
9 warrants some consideration is that if this -- is that the  
10 rules, Rule 45(d)(2)(B)(ii), allows for basically shifting of  
11 costs to produce the records.

12 And from Mr. Siegel's viewpoint, the four banker's  
13 boxes that you referred to, that's not going to require a  
14 real thorough privileged review for a number of reasons; one,  
15 given they're not asking for any sort of documents that could  
16 be privileged, they're just asking for what y'all received  
17 from the Commonwealth; and then, you know, third-party  
18 e-mails, things like that. Now, maybe that requires a bit of  
19 a review, but you certainly could ask for your copying costs  
20 for those documents. If it does require some review, you  
21 certainly can ask for fees on that.

22 Now, I'm not sure what the plaintiffs' position is  
23 on it, but that's -- you know, that's something that I think  
24 it's an argument you could have made earlier, but it's  
25 something that I am sensitive to as well.

1 MS. LUNSFORD: Could I -- I don't want to cut the  
2 Court off, but I do think it's important for the Court to  
3 understand the volume of documents that we have, what we have  
4 and what Mr. Siegel thinks we have, but we don't actually  
5 have, because I think what is going to happen in terms of  
6 what we can resolve today versus what we're going to have to  
7 resolve at some point in the future is privileged  
8 information, work-product information, and other sealed  
9 documents.

10 And I will tell you, if the -- I will say that we  
11 have e-mails from third parties, unsolicited e-mails from  
12 third parties. I'll tell the Court that in preparation for  
13 this -- and I apologize I didn't put it in the motion. I was  
14 trying to pay attention to my other court obligations and my  
15 other clients, while also filing a motion to reconsider  
16 within a certain period of time, and I was not familiar with  
17 the federal rules of court. I've tried to become more  
18 familiar with them with respect to civil procedure. And  
19 that's why we didn't do it earlier.

20 But back to e-mails, I'm not computer literate, but  
21 I did figure out how to find out how much information I have  
22 on e-mails related solely to Mr. Fields. And my e-mails  
23 related to him, which I kept in a separate folder, are 537  
24 megabytes of information.

25 Now, I'll tell the Court that means absolutely



1 nothing to me, but I did do some internet research and  
2 according to -- I think LexisNexis is one of the sites that  
3 talks about how much -- how many e-mails, for example, can be  
4 stored on 537 megabytes of whatever. It would consist,  
5 according to this site, of about 5500 e-mails and 1600  
6 attachments.

7 Those are not all from third parties that were  
8 unsolicited. Some of them are -- and it will require me to  
9 go through however much 537 megabytes of information is to  
10 isolate those and provide those as opposed to the e-mails  
11 between me and Mr. Hill, between me and the Commonwealth,  
12 between Mr. Hill and I and mental health experts, for  
13 example. So that's just with respect to e-mails.

14 I do have four boxes, one of which is jury  
15 questionnaires, which I understand the plaintiffs aren't  
16 seeking but are responsive; and as I read Rule 45, I would  
17 have to create a log indicating what I'm not providing but I  
18 do have that is responsive. So I have three --

19 THE COURT: Well, we can -- if I haven't already  
20 amended the -- the subpoena, it can be -- it can be amended  
21 so that that information is excluded. And plaintiffs have  
22 said on the record they don't want --

23 MS. LUNSFORD: I understand that.

24 THE COURT: So, I mean, that's not something you  
25 would need to put in.

1           Also, if privilege is really, you know, a concern,  
2 sometimes you can do categories rather than each individual  
3 document.

4           MS. LUNSFORD: We can try to do that. I will tell  
5 the Court that the bulk of the information that is in those  
6 three boxes -- at least one of them is trial materials. And  
7 when I say "trial materials," those are my handwritten notes.  
8 There are witness outlines. There are things of that nature.  
9 But there are at least two other boxes of information that I  
10 would need to go through. And I suspect much of that is  
11 privileged.

12           And at some point we're probably going to have to be  
13 before the Court on what is privileged, what is work-product,  
14 and what I am saying is privileged versus what Mr. Siegel  
15 thinks of as privileged, on things like Army records.

16           And Mr. Hill sent a letter to Mr. Siegel asking:  
17 You know, these are the kinds of documents that we have, what  
18 do you want?

19           And one of the kinds of documents that I have is  
20 what I refer to as historical information about our client.  
21 These are records that would not -- records that our client  
22 had to sign a release for us to get. They are largely  
23 protected by privilege. The bulk of them, I will say, I  
24 expect were created before January 1, 2015. But I need to go  
25 through all of them -- and they're not -- it's not a small

1 amount of paper records -- to see what is before January 2015  
2 and what's after.

3 I would argue even the stuff that's after January 1,  
4 2015 that are school records -- which might be very small  
5 after that date -- medical records, mental health records,  
6 Army records, are certainly work-product, because they were  
7 obtained by me during the course of this litigation for this  
8 criminal case for purposes of providing to or use by --

9 THE COURT: Did you create the documents?

10 MS. LUNSFORD: I didn't create them. I requested  
11 them from third parties. They're protected by --

12 THE COURT: Well, I don't see how they would be  
13 work-product. And there is a protective order in this case  
14 that I think would protect the medical records.

15 MS. LUNSFORD: They're protected by HIPAA, and I  
16 would argue that they're also privileged.

17 And I discussed with Mr. Zwierling, who, again, is  
18 acting as a volunteer, but has also done some research on  
19 work-product, and I think there's an argument that they are  
20 work-product.

21 With respect to pleadings, Mr. Siegel --

22 THE COURT: Well, but, Ms. Lunsford, I mean, why on  
23 earth are you asserting that now? You know, your motion was  
24 filed in February, and I -- I have to agree with Mr. Siegel  
25 that almost all this is entirely inappropriate to be raising

1 it in a motion to reconsider and then now, in this hearing,  
2 because just about every argument that you're asserting you  
3 knew of at the time, or at least you should have known of at  
4 the time, and it is not newly discovered. You know, it  
5 really is a quintessential second bite at the apple.

6 Now, I'm sympathetic to some things, you know, like  
7 the costs it would put on you, but the rest of it is -- you  
8 know, you're --

9 MS. LUNSFORD: Well, that's why I stated to the  
10 Court that I felt like we needed to talk about it now,  
11 because I would argue that most of this is either privileged  
12 or work-product, if it's not covered by HIPAA, or outside the  
13 time.

14 THE COURT: Well, I mean, is the -- are you talking  
15 about the information that you received from the Commonwealth  
16 as well? Do you think that's privileged?

17 MS. LUNSFORD: I don't think it's privileged. The  
18 problem with the information that was obtained from the  
19 Commonwealth -- and I do think the Court needs to weigh in on  
20 this, because Mr. Siegel has indicated that if it came -- if  
21 the United States Attorney provided a document, for example,  
22 to the Commonwealth, and the Commonwealth then provided that  
23 document to us, we should turn it over because we got it from  
24 the Commonwealth.

25 I don't care if it's discovery when I turn it over

1 or not if it came from the Commonwealth or the U.S. Attorney,  
2 but there are some documents that the U.S. Attorney gave to  
3 the Commonwealth that the Commonwealth then gave to us. And  
4 I don't know if the Court considers that discovery from the  
5 Commonwealth or something that we're prohibited from  
6 providing under --

7 THE COURT: I think it's from -- if you got it from  
8 the Commonwealth, then I think it came to you from the  
9 Commonwealth. It's not -- you know, it's not -- unless  
10 there's some -- something that would tie that to a federal  
11 court's order limiting dissemination, then it didn't come  
12 from the U.S. Attorney's Office to you, it came from the  
13 Commonwealth.

14 MS. LUNSFORD: The U.S. Attorney's Office takes a  
15 different view, but obviously that falls in their court.

16 In terms of, you know, Mr. Siegel's assertion that  
17 the Commonwealth doesn't know what it gave us, that we were  
18 allowed to copy documents, we were not. We were provided  
19 with discs. And the subpoena seeks original documents, but  
20 I'm still representing Mr. Fields on the appeal, and I cannot  
21 simply turn over the discs. I can -- once I determine what  
22 source they came from, I can perhaps clone them at the  
23 expense of the plaintiff.

24 We did not request information from social media  
25 accounts. We -- whatever we got was, in some ways, provided

1 by -- a lot of it was provided by the U.S. government in  
2 terms of social media accounts.

3 There are pleadings and information that we obtained  
4 from the clerk's office that are under seal that -- for  
5 example, every search warrant that was obtained by the City  
6 of Charlottesville police department in this matter -- and  
7 when I say "this matter," as it relates to the prosecution of  
8 Mr. Fields in the Commonwealth of Virginia, every search  
9 warrant was placed under seal.

10 In order to access those search warrants, I had to  
11 have the Court enter an order allowing me to access those  
12 documents and providing that I would not release them. Those  
13 are all documents that I got from the clerk's office that --  
14 and the Commonwealth's Attorney has copies of the search  
15 warrants from the officers that were never placed under seal.  
16 They're not under any obligation to keep those, I mean, if  
17 they have them -- under the Court's theory, this Court's  
18 theory that it's from a different source, they got them from  
19 the police department.

20 The -- I'm trying to look at the different  
21 categories of information. The electronic files that are on  
22 my computer, that I would need to go through to determine  
23 whether it was something that I created, something I received  
24 from a third source, third party, or something I received  
25 from the Commonwealth, my electronic files are 24.5 gigabytes

1 of information, much of which will be work-product or  
2 privileged.

3 And I'm assuming that the plaintiffs and the Court,  
4 if I'm claiming that something on my computer or in my files  
5 that I received from a third source is privileged,  
6 work-product, protected by HIPAA, or under seal, that,  
7 pursuant to the rules, I'm going to need to create a log  
8 indicating what there is.

9 And I agree with the Court, some of it can be rather  
10 broad, but some of it is not going to be -- some of the  
11 information on the log is not going to be that broad.

12 THE COURT: So, Ms. Lunsford, I think there are some  
13 things that sounds like there's nothing -- I think there's  
14 nothing prohibiting you from turning it over. I mean, the  
15 materials from the Commonwealth that are -- that are outside  
16 of the protective order -- so exculpatory materials, things  
17 like that -- that should all be turned over. Anything that  
18 you or Mr. Fields under the criminal discovery rules in  
19 Virginia are entitled to receive, I think that's outside of  
20 the scope of Judge Downer's order.

21 Do you agree with that?

22 MS. LUNSFORD: I agree.

23 THE COURT: Okay. So I think that needs to be  
24 turned over. And there are some things that I think should  
25 just be -- you need to just go ahead and you need to get

1 those to the plaintiffs. And then there's some other  
2 categories that maybe are a little more difficult.

3 The third-party e-mails to you that are unsolicited,  
4 where people are just reaching out to you, I have trouble  
5 seeing how that would be, you know, work-product because  
6 it --

7 MS. LUNSFORD: I agree. My concern with that is the  
8 amount of time that it's going to take me to go through the  
9 e-mails to find those, as opposed to the ones from Mr. Hill.  
10 And some of them will be easy. Some of them may not be so  
11 easy.

12 THE COURT: Yeah.

13 MS. LUNSFORD: And I agree. Ones that I received  
14 from third parties unsolicited, I have not had the  
15 opportunity to go through them. I can tell the Court that  
16 I'm concerned about the amount of time that it will take and  
17 my ability to pay my mortgage and rent.

18 THE COURT: Well, and I -- and, Ms. Lunsford, you  
19 know, like I said earlier, I think there is a provision in  
20 the federal rules to allow for payments to cover, you know,  
21 the costs of producing these documents, and so I think that's  
22 something that we'll certainly have to consider here.

23 All right.

24 THE CLERK: Your Honor, can you wait just a minute?  
25 My recording has stopped.



1 THE COURT: Okay.

2 (Pause in proceedings)

3 THE CLERK: Okay. It's recording, Your Honor.

4 THE COURT: All right.

5 MR. SIEGEL: Your Honor, this is Joshua Siegel. If  
6 I -- Ms. Lunsford had quit. If I could just have a minute or  
7 two to make a few very brief comments.

8 THE COURT: Sure.

9 MR. SIEGEL: So, you know, on the issue of burden,  
10 we're trying -- we're really trying everything we can think  
11 of to help move this along. You know, not once have  
12 Ms. Lunsford and Mr. Hill met and conferred before any of  
13 their motions. But we have told them -- you know, Mr. Hill  
14 sent me a letter yesterday about certain categories, and I  
15 responded to him this morning and said, you know, some of  
16 these categories, you don't have to even review. He asked  
17 me, for example, you know, pleadings that were filed, did he  
18 have to produce all the pleadings that were filed. We said  
19 no, you don't have to produce those. Other categories we've  
20 told him multiple times, like the jury questionnaires, jury  
21 information, no, don't produce that. Let's narrow the scope,  
22 let's make it easier. You don't have to produce those  
23 pleadings; that's not what we're looking for. Don't produce  
24 the jury questionnaires.

25 Things that they mentioned in their brief, like

1 communications with the court clerk or communications with  
2 the federal public defenders, obviously, again, we're not  
3 looking for public documents. The e-mails, you know, to the  
4 clerk filing things, we don't need that. We don't have to  
5 review that kind of stuff. We're trying to narrow this as  
6 much as we possibly can.

7 On the issue of what is easy for them to produce  
8 now, there are certain categories that they can literally  
9 press a few buttons and get documents to us. They have  
10 electronic devices, a hard drive, and three thumb drives.  
11 They know none of it is privileged. They know it is all  
12 responsive. There's no reason they can't give that to us  
13 right now.

14 They have other documents, like the e-mails. Your  
15 Honor, one of the things I do quite a bit in my practice is  
16 electronic discovery. I'm happy to work with Ms. Lunsford  
17 and make suggestions on ways she can search through her  
18 e-mail to make it less burdensome. I'm happy to do that,  
19 Your Honor.

20 But the bottom line is: As you just heard her say,  
21 Your Honor, I think Ms. Lunsford and Mr. Hill have a bit of a  
22 broad understanding of the work-product doctrine, and she is  
23 planning on asserting things like Mr. Fields' school records  
24 are somehow work-product. And so if we're going to be back  
25 here having a fight over that, that's all the more reason we

1 need these documents now. We've been waiting for -- we're  
2 pushing seven months on the subpoena right now. There are  
3 things that they can get us quickly and easily, and they  
4 should have to give it to us right now, without delay.

5 And as relates to the documents that they got from  
6 the Commonwealth's Attorney, again, we're not obligated to  
7 have to try and get them from the Commonwealth's Attorney. I  
8 just believe it's easier for them to produce it, because they  
9 literally have it segregated already on a hard drive and on  
10 three thumb drives, and the Commonwealth's Attorney doesn't  
11 have to recreate it. Ms. Lunsford and Mr. Hill can just  
12 produce it.

13 And, again, as relates to that Court order, Your  
14 Honor, frankly, from my perspective, it's too little too late  
15 on this motion. Again, this is a motion to reconsider. This  
16 is not new evidence. That order has been here for two years.  
17 And, frankly, I think the Court is right, it doesn't apply  
18 for a few of the other reasons I mentioned. And if  
19 Ms. Lunsford and Mr. Hill think it does, then, again, I think  
20 they've already got consent from the Commonwealth's  
21 Attorney's Office; they can produce these documents. They  
22 have an order, Your Honor. It would be very easy for them,  
23 if they want to make sure they're not violating the Court's  
24 order, just to submit an agreed order to the judge, allowing  
25 them to produce the documents. Again, they already have

1 agreement from all the parties. That takes care of that  
2 order. There's no reason that they can't be held to the  
3 standard in this Court's order to produce those documents.

4 THE COURT: And, you know, I certainly want to make  
5 sure that I'm affording all respect to the Charlottesville  
6 General District Court's order and discovery practices, too.  
7 So while this order was presented to me at such a late time,  
8 I also -- it's something I think I have to consider and make  
9 sure that this Court is -- is properly taking into account.  
10 You know, what I had said in the previous order on the  
11 motions to quash as to the federal court, that really the  
12 federal court's criminal discovery order is really a matter  
13 that needed to be raised, and in that case, you know, I'm  
14 just wondering if it's something that if the Commonwealth  
15 isn't -- has essentially waived their -- waived the  
16 protections that they sought for discovery, then, of course,  
17 the plaintiffs and y'all want this information.

18 And, Ms. Lunsford, is this something that y'all can  
19 present an agreed-upon order to the General District Court  
20 just saying that it would be -- you know, that under this  
21 Court's order, that --

22 MS. LUNSFORD: I'd be happy to do that.

23 THE COURT: -- they can be relieved of that order,  
24 with the understanding that anything that's produced, you  
25 know, if it's sensitive material, there's a protective order

1 in this case as well, so it's not that this information is  
2 all of a sudden just going to be splashed about?

3 MS. LUNSFORD: Yeah, I would request that the  
4 plaintiff draft that. You know, I -- I don't mean to be  
5 disrespectful to the Court. I actually have -- it's just me,  
6 so in order to start going through the documents, copying  
7 discs and thumb drives, going through e-mails, preparing  
8 orders for the Court, I'm the only one that can go through my  
9 e-mails. The Commonwealth -- or Mr. Siegel can prepare an  
10 order for the Court that can be sent to me electronically,  
11 and I'll walk it over to the Court or send it to the  
12 Commonwealth and ask that they get it entered.

13 MR. SIEGEL: Your Honor, I'm happy to draft that and  
14 have it to Ms. Lunsford tomorrow.

15 THE COURT: Certainly, Ms. Lunsford, I think that's  
16 an appropriate request. I do think it should be something  
17 that could come from the -- you know, from the plaintiffs.  
18 And on that -- again, on the electronic discovery, you know,  
19 I would encourage to take up Mr. Siegel's offer about how  
20 to -- either how to search or, you know, whether there can  
21 be, you know, some -- some sort of a third-party vendor who  
22 could harvest the e-mails; but do that. And, again, there's  
23 a cost-shifting provision in Rule 45 that if this is  
24 something that's going to be substantial, that you can  
25 certainly talk to Mr. Siegel about it. It's something that I

1 would certainly entertain.

2 MR. SIEGEL: Your Honor, this is Mr. Siegel. Can I  
3 make a suggestion?

4 THE COURT: Sure.

5 MR. SIEGEL: You know, one way to structure the  
6 order here is to require production of documents that fall  
7 outside the scope of that District Court order, including  
8 things under Rule 3A, the other documents from third parties,  
9 things like that, within -- you know, within -- I think they  
10 asked for ten days from the date of this hearing. I think we  
11 would be okay with that if they really need that much time,  
12 Your Honor.

13 And then insofar as it relates to the documents  
14 within the scope, order they submit that agreed order within,  
15 you know, a day or two; and then within 24 hours of the Court  
16 granting that order, to produce those documents to us.

17 Because what I don't want to have happen, Judge, is  
18 the District Court enters the agreed order, two weeks from  
19 now, and then we're back here, Oh, we haven't started  
20 reviewing the stuff yet, and we don't know where it is, we've  
21 got to find all of it. And it's just going to cause more and  
22 more delay.

23 Again, we have just a few weeks left of deposition  
24 time here. We just really can't afford to keep litigating  
25 this, especially, again, if we have to litigate issues about

1 whether a school record is work-product.

2 MS. LUNSFORD: Well, you know, I -- I will -- in  
3 terms of what we can and can't afford to do, Mr. Hill and I  
4 cannot afford to shut down our practices for the next two  
5 weeks in order to respond to the discovery. I will make  
6 every effort to do it quickly, and if the plaintiff wants to  
7 talk about some sort of compensation for time, I'm happy to  
8 keep time.

9 With respect to school records, I will tell  
10 Mr. Siegel, and so the Court knows, the vast majority of his  
11 school records are prior to January 1, 2015. That does not  
12 necessarily hold true with respect to his medical records.  
13 But I would assert that his medical records and what are his  
14 school records, Army records, are protected by HIPAA. And I  
15 understand the confidentiality, you know, and the expert  
16 confidential designation that can be applied, but I would  
17 also argue that they're privileged, and I do think they're  
18 work-product. And they were obtained -- they were never used  
19 in this litigation except to allow an expert to review them  
20 for purposes of mitigation in a murder case.

21 MR. SIEGEL: Again, Your Honor, that was kind of  
22 exactly my point, is, you know, none of the documents she  
23 described did she create in anticipation of litigation. You  
24 know, these are squarely not work-product, but it sounds like  
25 we're going to have to have that fight, and that's why we

1 really need to get this over with the sooner the better.

2 MS. LUNSFORD: And I would argue, also, that the  
3 subpoena is overbroad if -- if it is -- if it is -- when it  
4 relates to all documents that were obtained from any third  
5 party, which would include medical care providers, with no  
6 limitation except the date, that they're not relevant to any  
7 matter that's in dispute in the civil proceeding, as far as  
8 Mr. Campbell has explained it to me.

9 MR. SIEGEL: Your Honor, any relevancy or overly  
10 broad objections we could have heard on the motion to quash.  
11 There's no need --

12 THE COURT: I agree. I agree with that.

13 And, Ms. Lunsford, if y'all want to confer further  
14 and see if the plaintiffs are willing to -- you know, to not  
15 require certain documents to be produced, you know, there may  
16 be some that they would agree are not relevant, but I really  
17 think that that -- you know, that that argument, really it's  
18 way beyond time to raise that.

19 On the privilege -- and you can -- you can  
20 certainly -- with the work-product, I really have trouble  
21 seeing how that can be work-product. I understand that you  
22 obtained it, but you didn't create these documents and it  
23 doesn't have anything with -- with your mental impressions on  
24 them. I think, at most, it would be, in fact, work-product.  
25 And at this point, I think that I could very easily find that



1 the plaintiffs don't have any other ability, any other way to  
2 obtain that information, and that there is a substantial need  
3 for it. So if I had to -- if I had to make that ruling, I  
4 think that's how I would come down; that even if it is  
5 work-product, it would have to be produced. But I think  
6 there probably is some good argument that it's been waived at  
7 this point.

8 Look, I think that -- I think that what has to  
9 happen on this motion to reconsider is -- is that there are  
10 some categories of documents that I think clearly are not  
11 covered by the General District Court's protective order or  
12 criminal discovery order, and also the Federal District  
13 Court's discovery order and that would need to be produced.  
14 I'll put that in an order, but it would be the exculpatory  
15 documents, third-party e-mails. And I'll set forth the other  
16 ones in a written order, but I think those do need to be  
17 produced as soon as possible.

18 Again, Ms. Lunsford, I think that you have a good  
19 argument for shifting the costs to the plaintiffs in this  
20 case. You know, I would hope you and Mr. Siegel can talk  
21 about that, any reasonable expense that you have to incur in  
22 reviewing and producing documents; and then anything that --  
23 any costs for copying, you know, I think that those would be  
24 compensable.

25 And if the plaintiffs have a counter or contrary

1 argument, you can certainly make that, but that's -- that's  
2 how I'm viewing this at this time.

3 As to the Charlottesville General District Court  
4 order, I do think that that's -- it's an order that deserves  
5 respect from this Court, and I certainly intend to accord it  
6 that respect. And there may be some arguments that not  
7 everything is covered, but it sounds -- but I also do think  
8 that the best approach is for -- if the Commonwealth isn't  
9 opposing it -- and it sounds like, Ms. Lunsford and perhaps  
10 Mr. Hill, that you aren't opposing being relieved of that  
11 order, either -- you know, a joint motion be presented to the  
12 General District Court and ask that that order limiting any  
13 dissemination from defense counsel's possession or control of  
14 the documents be lifted to allow -- but in a limited  
15 circumstance, I think, to be produced pursuant to, you know,  
16 a lawful Court order, like from this Court, directing that  
17 the information be produced.

18 And anything that should be -- that should be  
19 confidential under the protective order that this Court has  
20 entered in this case would certainly be protected from  
21 further dissemination.

22 So I really -- I think that's probably how this  
23 would have to go.

24 MS. LUNSFORD: And am I to understand -- because the  
25 U.S. Attorney has e-mailed me today wanting to know the

1 Court's order -- that if a document that was produced, for  
2 example, created by an FBI agent was provided to the  
3 Commonwealth, and then from the Commonwealth to the defense,  
4 that that is something that we need to turn over despite this  
5 Court's earlier order in the criminal case?

6 I'm not arguing; I'm just asking for clarification.

7 THE COURT: Well, I mean, my order, I think,  
8 recognized the scope of the order that was entered by the  
9 Federal District Court in the criminal case in federal court  
10 and it talks about, I think, the materials provided by the  
11 U.S. Attorney's Office to defense counsel. My view is if it  
12 comes from the Commonwealth's Attorney's office, that's not  
13 the U.S. Attorney's Office.

14 MS. LUNSFORD: Yes, sir.

15 THE COURT: Mr. Siegel, Ms. Lunsford, you know, if  
16 the U.S. Attorney's Office takes a different view, it's  
17 probably a good idea for y'all to have some contact with them  
18 and see if there can be an order presented in the Federal  
19 District Court as well, again, that would allow any  
20 dissemination. That's certainly something that she can look  
21 into.

22 MR. SIEGEL: All right. Thank you.

23 THE COURT: Mr. Siegel, does that cover everything?

24 MR. SIEGEL: I think it does, Your Honor. My only  
25 question is, as far as deadlines and the dates, so we can

1 kind of know the ball is moving forward on this, if Your  
2 Honor wants to get those now or if those are going to be a  
3 forthcoming order.

4 THE COURT: Well, I think it needs to be in a --  
5 just a pretty short written order, but it's going to be up to  
6 the General District Court about how quickly it moves on the  
7 order. I certainly can't require that but I -- Ms. Lunsford,  
8 sounds like you think that you will be able to get that  
9 order -- once you receive it from plaintiffs' counsel, get  
10 that submitted pretty quickly?

11 MS. LUNSFORD: I'll transmit it to the Commonwealth  
12 and see if Mr. Platania will take it up with either the  
13 General District Court or the Circuit Court, as he thinks  
14 appropriate.

15 My concern is I also need to focus on the other  
16 information. So to the extent to which Mr. Siegel can  
17 communicate directly with Mr. Platania, it would be helpful.  
18 If he doesn't want to do that, I'll certainly make it happen  
19 as soon as I can.

20 MR. SIEGEL: All right. Your Honor, on behalf of  
21 the plaintiffs, I'm happy to do what I can to coordinate with  
22 the Commonwealth's Attorney and Ms. Lunsford. I only ask  
23 that -- I know we can't know when the District Court is going  
24 to move on that, but we ask that you put a deadline actually  
25 running from the date that the District Court enters that

1 agreed order, as far as a deadline, you know, for documents.

2 THE COURT: Yeah, I will. I will do that.

3 And, Ms. Lunsford, is it accurate that some of  
4 the -- some of the information received, that you received  
5 from the Commonwealth, that it's on thumb drives and things  
6 like that?

7 MS. LUNSFORD: It -- it is. It's not all that way.

8 THE COURT: All right. I would certainly think that  
9 things like that, they could be copied very quickly, in  
10 either a day or two, and turned over, if the state court  
11 agrees to enter the proposed order. So some things like  
12 that, I think, can certainly be turned over, they can be  
13 turned over very quickly. There may be some other things  
14 that would take a little bit longer to go through and  
15 assemble, but --

16 MR. SIEGEL: Your Honor, actually, I'm not sure if  
17 Ms. Lunsford is aware, but we've provided Mr. Hill with an  
18 electronic link where he can actually -- you can actually  
19 just upload documents. You don't need to copy them or  
20 anything. You can just upload them to our secure firewalled  
21 website, and there's a secure encrypted link where you don't  
22 even need to copy it if it's electronic. You just upload  
23 them and they instantly get sent to us. So I'm happy to send  
24 that link to Ms. Lunsford as well.

25 THE COURT: Okay. All right. Well, I will put in

1 some deadlines and, you know, I'll certainly -- you know,  
2 I'll try and be reasonable with those, but I definitely  
3 recognize that, you know, time is running out in the civil  
4 case. And, you know, a lot of these arguments are things  
5 that I think could have been raised and dealt with sooner,  
6 so --

7 MS. LUNSFORD: I don't disagree. Your Honor, and  
8 everyone, I apologize to the Court for not doing that. In  
9 light of our small practice, our unfamiliarity with civil  
10 rules of procedure and what was required, you know, frankly,  
11 we were expecting the plaintiffs to request a hearing.

12 I will point out that I did raise the issue of the  
13 plaintiffs' ability to get information from other sources in  
14 the motion to quash. I understand it was not addressed. We  
15 didn't brief it. And I apologize for that.

16 THE COURT: All right. Well, yeah, I'll encourage  
17 you all to just confer further because I think -- Mr. Hill  
18 and Ms. Lunsford, I do think that that's another way to  
19 really ease some of the burden that is placed on y'all to  
20 make this production. And I will try and just get the order  
21 out either today or tomorrow on this. Okay?

22 And to be clear, I think -- I think that the  
23 discovery order from the General District Court, even though  
24 it was raised really late, I think because of the importance  
25 of showing respect to another Court's order, I think that is

1 something that I have to consider and it gives reason to  
2 reconsider the order.

3 I think that most of the other reasons raised by  
4 Ms. Lunsford and Mr. Hill don't warrant reconsideration, but  
5 I do think that some sort of cost-shifting is appropriate.  
6 And it seems to me that you all can discuss the scope of the  
7 production and confer, and I really think that that's going  
8 to be in everyone's interest to do.

9 Okay?

10 MR. SIEGEL: Thank you, Your Honor.

11 THE COURT: All right. Is there anything else we  
12 need to address today?

13 MR. SIEGEL: Your Honor, this is Mr. Siegel. Just  
14 one thing. I don't think it really requires the Court to  
15 address it, but I just wanted to make the Court aware.

16 Obviously because of some of these delays in getting  
17 documents, I think the parties might end up having to agree  
18 to shuffle some of the deadlines around depositions and  
19 things like that, just to make sure certain people get  
20 deposed with documents, and not having to do it twice. And  
21 to the extent that's necessary, the parties will endeavor to  
22 reach an agreement on that. So I just want to make the Court  
23 aware that that might be necessary.

24 THE COURT: Okay. All right. All right. Well, I  
25 appreciate y'all working on those, and we definitely want to

1 keep -- try and keep things on track to get the case tried in  
2 October.

3 MR. SIEGEL: Agreed.

4 THE COURT: All right. All right. Thank you all.  
5 Take care.

6 MS. LUNSFORD: Thank you.

7 MR. SIEGEL: Thank you, Your Honor.  
8 (Proceedings adjourned, 2:38 p.m.)

9 C E R T I F I C A T E

10 I, JoRita B. Meyer, RMR/CRR, Official Court Reporter for  
11 the United States District Court for the Western District of  
12 Virginia, appointed pursuant to the provisions of Title 28,  
13 United States Code, Section 753, do hereby certify that the  
14 foregoing is a correct transcript of the proceedings reported  
15 by me using the stenotype reporting method in conjunction  
16 with computer-aided transcription, and that same is a  
17 true and correct transcript to the best of my ability and  
18 understanding.

19 I further certify that the transcript fees and format  
20 comply with those prescribed by the Court and the Judicial  
21 Conference of the United States.

22 /s/ JoRita B. Meyer

Date: 6/29/2020

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